

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT STEWART,

Plaintiff,

vs.

BANK OF AMERICA, N.A.,

Defendant.

Case No.: 2:19-cv-00699-GMN-NJK

ORDER

Pending before the Court is Defendant Bank of America, N.A.’s (“BANA”) Motion to Dismiss, (ECF No. 15). Plaintiff Robert Stewart (“Plaintiff”), acting pro se,¹ filed a Response, (ECF No. 17), and BANA filed a Reply, (ECF No. 18). Thereafter, Plaintiff filed an “Amended Response,” (ECF No. 19), which the Court will construe as a Surreply. BANA filed a Response to the Surreply, (ECF No. 20).

Also pending before the Court is BANA’s Motion for Summary Judgment, (ECF No. 37). Plaintiff filed a Response, (ECF No. 43), and an “Amended Response,” (ECF No. 44). BANA filed a Reply, (ECF No. 45). Plaintiff subsequently filed another “Amended Response,” (ECF No. 46). For the reasons discussed below, the Court grants BANA’s Motion to Dismiss, and denies BANA’s Motion for Summary Judgment as moot.

I. BACKGROUND

The following facts are derived from the Complaint; the exhibits attached thereto; Plaintiff’s Chapter 7 bankruptcy filings and schedules; and recorded property documents.²

¹ In light of Plaintiff’s status as a pro se litigant, the Court liberally construes his filings, holding them to standards less stringent than pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

² In ruling on a motion to dismiss, “[a] court may . . . consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.” *See United States v. Ritchie*, 342 F.3d

1 The present case involves a dispute over real property located at 10399 Gwynns Falls
2 Street, Las Vegas, Nevada 89183 (the “Property”). (Compl. at 1, ECF No. 1-1). On April 4,
3 2008, Marguerite Stewart (the “Borrower”) obtained a reverse mortgage in favor of
4 Countrywide Bank, FSB, with a maximum principal balance of \$390,000 (the “reverse
5 mortgage”) and secured by the Property. (Adjustable Deed of Trust and Adjustable Second
6 DOT, Ex. A to Mot. Dismiss (“MTD”), ECF No. 15-1). Plaintiff was not a party to the reverse
7 mortgage or a non-borrower spouse or resident. (*See id.*). Pursuant to the terms of the reverse
8 mortgage, the lender could immediately accelerate the sums due upon the Borrower’s death or
9 upon transfer of all of the Borrower’s interest in the property. (*Id.*). On July 19, 2015, the
10 Borrower died intestate. (Probate Order, Ex. B to MTD, ECF No. 15-2).

11 On August 28, 2017, Plaintiff, who is the Borrower’s son, recorded a Quitclaim Deed
12 dated November 15, 2003, purporting to transfer the property from the Borrower to himself.
13 (Quitclaim Deed, Ex. 5 to Compl., ECF No. 1-1). On May 23, 2018, the Probate Court issued
14 an Order Setting Aside Estate of Marguerite Stewart Mcinnis Without Administration, which
15 transferred the Property to Plaintiff. (Probate Order, Ex. B to MTD).

16 On October 23, 2017, the Substitute Trustee, National Default Servicing Corp. (“NDS”),
17 recorded a Notice of Default and Election to Sell Under Deed of Trust, the Affidavit of
18 Authority in Support of Notice of Default and Election to Sell, and the Nevada Declaration of
19 Compliance (collectively, the “Notice of Default”). (*See* Not. Default, Ex. C to MTD, ECF No.
20 15-3). On March 20, 2018, NDS recorded the State of Nevada Foreclosure Mediation Program
21 Certificate. (Mediation Cert., Ex. D to MTD, ECF No. 15-4). On May 18, 2018, NDS recorded
22 the Notice of Trustee’s Sale. (Not. Trustee’s Sale, Ex. E to MTD, ECF No. 15-5). On October
23 2, 2018, the Property was sold to BANA at the foreclosure sale. (Trustee’s Deed Upon Sale,
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25 903, 908 (9th Cir. 2003); *see* Fed. R. Evid. 201. Accordingly, the Court will consider the above-referenced
documents in ruling on the instant Motion to Dismiss. *Daprizio v. Harrah’s Las Vegas, Inc.*, No. 2:10-cv-00604-
GMN, 2013 WL 5328386, at *3 (D. Nev. Sept. 20, 2013).

1 Ex. 6 to Compl., ECF No. 1-1). On December 19, 2018, BANA filed an unlawful detainer
2 action against plaintiff in the Las Vegas Justice Court, Case No. 18C031005. (Register of
3 Actions, Ex. F to MTD, ECF No. 15-6). An order granting a temporary writ of restitution was
4 entered on March 20, 2019. (*See id.*).

5 On March 14, 2019, Plaintiff filed a “Summary of Argument,” which the Court liberally
6 construes as a Complaint, (ECF No. 1-1), in Nevada state court. BANA subsequently removed
7 to federal court on the basis of diversity jurisdiction. (Pet. Removal, ECF No. 1). In his
8 Complaint, does not enumerate any particular causes of action. Plaintiff appears to assert that
9 BANA failed to provide him with a notice of default, notice of sale, or other foreclosure notice.
10 (Compl. at 2). Plaintiff seeks a temporary restraining order and preliminary injunction
11 prohibiting BANA “from proceeding with, or taking any other action, regarding foreclosure on
12 a certain Trustee’s Deed Upon Sale . . .” (*Id.* at 1). Plaintiff states that he does not want to
13 vacate the property until it is sold to a third party, and he does not want to pay rent, fees, or
14 costs. (*Id.* at 2–3). Plaintiff further contends he is entitled to damages in the amount of \$5,874
15 (related to the alleged improper fees for inspection/appraisal), and any remaining funds after
16 the reverse mortgage is paid off at a sale to a third party in an amount not less than \$30,000.00.
17 (*Id.*).

18 On April 15, 2019, Plaintiff filed a Chapter 7 bankruptcy in the U.S. Bankruptcy Court
19 for the District of Nevada, Case No. BK-19-12285-mkn (“Bankruptcy Action”). (*See* Official
20 Form 101, Ex. G to MTD, ECF No. 15-7). Plaintiff’s Bankruptcy Action stayed the Eviction
21 Action. On Plaintiff’s bankruptcy schedules, Plaintiff identified his interest in the property,
22 BANA’s secured interest in the property, and the foreclosure. (*See* Schedule A/B, D, Official
23 Form 107, Ex. H to MTD, ECF No. 15-8). However, Plaintiff did not identify the eviction
24 action or the present case. (Official Form 107 at Part 4, Ex. H to MTD). BANA now moves to
25 dismiss Plaintiff’s Complaint for failure to state a claim upon which relief can be granted.

1 **II. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
3 that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp.*
4 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
5 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
6 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
7 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
8 complaint is sufficient to state a claim, the Court will take all material allegations as true and
9 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792
10 F.2d 896, 898 (9th Cir. 1986).

11 The Court, however, is not required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
13 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
14 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
15 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
16 *Twombly*, 550 U.S. at 555).

17 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
18 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
19 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's
20 complaint contain only "a short and plain statement of the claim showing that the pleader is
21 entitled to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed
22 because "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d
23 1172, 1179 (9th Cir. 1996). Mindful of the fact that the Supreme Court has "instructed the
24 federal courts to liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*,

1 832 F.2d 1132, 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the
2 appropriate degree of leniency.

3 “Generally, a district court may not consider any material beyond the pleadings in ruling
4 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
5 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
6 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
7 “documents whose contents are alleged in a complaint and whose authenticity no party
8 questions, but which are not physically attached to the pleading, may be considered in ruling on
9 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
10 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
11 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
12 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
13 materials outside of the pleadings, the motion to dismiss is converted into a motion for
14 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
15 Cir. 2001).

16 If the court grants a motion to dismiss, it must then decide whether to grant leave to
17 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
18 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
19 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
20 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
21 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
22 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

23 **III. DISCUSSION**

24 BANA moves to dismiss arguing, *inter alia*, that Plaintiff is judicially estopped from
25 alleging any of causes of action against BANA because Plaintiff filed a Chapter 7 Bankruptcy

1 Action on April 15, 2019, and never disclosed the eviction action or the present case in his
2 bankruptcy schedules and disclosures. (*See* Schedule A/B, D, Official Form 107, Ex. H to
3 MTD, ECF No. 15-8). In his Response, Plaintiff does not respond to BANA's judicial estoppel
4 argument, nor does Plaintiff dispute the existence of the Bankruptcy Action. (*See* Resp., ECF
5 No. 17). Plaintiff's Surreply similarly fails to address BANA's judicial estoppel argument.
6 (*See* Surreply, ECF No. 19). Nevertheless, Local Rule 7-2(b) of the District of Nevada
7 provides: "Surreplies are not permitted without leave of court; motions for leave to file a
8 surreply are discouraged." As such, the Court will not consider Plaintiff's Surreply or BANA's
9 response to the Surreply.

10 "Judicial estoppel is an equitable doctrine that precludes a party from gaining an
11 advantage by asserting one position, and then later seeking an advantage by taking a clearly
12 inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.
13 2001). "In the bankruptcy context, a party is judicially estopped from asserting a cause of
14 action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or
15 disclosure statements." *Id.* at 783. Section 521 of Title 11 of the United States Code requires
16 that a debtor file "a list of creditors, and unless the court orders otherwise, a schedule of assets
17 and liabilities, a schedule of current income and current expenditures, and a statement of the
18 debtor's financial affairs." *Id.* at 784 (citing 11 U.S.C. § 521). This required disclosure
19 includes any contingent and unliquidated claims, and the duty continues for the duration of the
20 bankruptcy proceeding. *Id.* at 785. "Judicial estoppel will be imposed when the debtor has
21 knowledge of enough facts to know that a potential cause of action exists during the pendency
22 of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the
23 cause of action as a contingent asset." *Id.* at 784 (citing *Hay v. First Interstate Bank of*
24 *Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992)). While *Hay* and *Hamilton* are summary
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1 judgment cases, there is no reason their analysis and conclusion would not apply in this case.
2 Both cases support the proposition that judicial estoppel should be applied here.

3 In *Hay*, the Ninth Circuit recognized that while the plaintiff did not know all the facts,
4 the plaintiff knew enough to require notification of the asset (*i.e.*, the action/suit against a
5 creditor) to the bankruptcy court. *Hay*, 978 F.2d at 557. The Ninth Circuit ruled that the
6 plaintiff's failure to give the required notice estopped the plaintiff and justified the district
7 court's grant of summary judgment to the defendants. *Id.*

8 *Hamilton* emphasized that "[t]he debtor's duty to disclose potential claims as assets does
9 not end when the debtor files schedules, but instead continues for the duration of the
10 bankruptcy proceeding." *Hamilton*, 270 F.3d at 785 (citations omitted). *Hamilton* additionally
11 explains that courts "must invoke judicial estoppel to protect the integrity of the bankruptcy
12 process," which includes preventing a debtor from deceiving the bankruptcy court, and
13 acquiring an "unfair advantage" due to having enjoyed "the benefit of both an automatic stay
14 and a discharge of debt in the debtor's Chapter 7 bankruptcy proceeding." *Id.*

15 The rulings and reasoning in *Hay* and *Hamilton* compel this Court to dismiss the
16 Complaint. Here, as noted, Plaintiff initiated a Chapter 7 Bankruptcy Action. From the facts
17 presented here, the Court finds no basis on which to determine that Plaintiff's omission of the
18 instant action from his bankruptcy schedules and disclosure statements was based on
19 inadvertence or mistake. Indeed, Plaintiff initiated the Bankruptcy Action *after* initiating the
20 instant case. Thus, Plaintiff had "knowledge of enough facts to know that a potential cause of
21 action exists during the pendency of the bankruptcy[.]" *Hamilton*, 270 F.3d at 784.
22 Accordingly, judicial estoppel will be imposed, and Plaintiff's causes of action must be
23 dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be
24 granted. Because this is an absolute bar to Plaintiff's claims, any amendment would be futile,
25 and therefore the dismissal must be with prejudice.

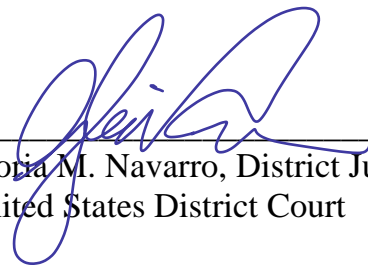
1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that BANA's Motion to Dismiss, (ECF No. 15), is
3 **GRANTED.**

4 **IT IS FURTHER ORDERED** that Plaintiff's Complaint is **DISMISSED with**
5 **prejudice.**

6 **IT IS FURTHER ORDERED** that BANA's Motion for Summary Judgment, (ECF No.
7 37), is **DENIED as moot.**

8 **DATED** this 23 day of March, 2020.

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12 Gloria M. Navarro, District Judge
13 United States District Court
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